No. 11,142

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel,

Appellants,

vs.

United States of America,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

APPELLANTS' CLOSING BRIEF.

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INTRODUCTION.

In its brief, respondent makes a number of assertions of fact which are not sustained by the evidence, and which are unwarranted inferences from facts which were established or statements made in appellants' opening brief. Respondent, further, bases its argument in a large part upon decisions which are not at all applicable to the facts before this Court, and, since the propositions which they declare must be read and understood in the light of the facts of those cases, we here point out to this Honorable Court the fallacy of respondent's argument.

At the time this reply is composed, appellants have received only a typewritten copy of respondent's brief. Necessarily, therefore, no reference can be herein made to the printed record. This requires that appellants' closing argument follow in sequence the argument of respondent, and that reply to fallacies in respondent's argument be made in sequence. By any other approach it would be impossible for appellants to direct the attention of this Honorable Court to the specific portion of the respondent's brief to which answer is made.

For the greater convenience of this Honorable Court, instead of adopting as titles statements of law and fact favorable to appellants and arguendo their cause, we have copied verbatim the titular divisions of respondent's brief, and under each title follows our reply thereto.

ARGUMENT.

I.

"APPELLANTS WERE NOT ENTITLED TO RECOVER A SUBSTANTIAL AWARD FOR THE ALLEGED TAKING OF THE RIGHT TO REMOVE GRAVEL AND GOLD WHICH WAS NEVER EXERCISED."

Under this heading respondent asserts:

> "Moreover, appellants admit that they have not actually suffered monetary loss (Br. 2)."

By this statement respondents must refer to this portion of appellants' opening brief:

> "The District Judge tried the case, made his findings and rendered his judgment under the misconception that he was sitting as a Court of Claims to determine the actual monetary damages which appellants sustained as a result of the limited exercise by the United States of America, respondent, of the rights and privileges"
>
> (App. Br. 2-3.)

or else to this portion:

> "that this disregard of testimony was the result of a determination, not of injury in law when the rights and privileges were taken, but of monetary loss in fact after the rights and privileges taken had expired and respondent had, through no fault of appellants, failed to enjoy those rights and privileges to the full extent that they were taken."
>
> (App. Br. 3.)

It is thoroughly possible that in the making of those statements we did not point out with sufficient clarity the distinction we had in mind. That such may have been the case, with the permission of this Honorable Court, may we try again?

First, there are two concepts of loss to the private land owner. First there is his actual loss, which includes the profit which he intended to earn from the full enjoyment of his property. That is the profit, the acquisition of which would have induced a mining man to have paid appellants $12,000 for property which was useless if it could not be used for mining. Appellants concede that not only can they not recover those anticipated profits in this action, but they can-

not even recover interest on the anticipated profits, no matter how certain they may have been, for the delay of their realization. Even although this was an actual out-of-pocket loss to appellants of $18,515 to $20,125, it is not such a loss as is directly reimbursable in a condemnation action. The other concept is the actual market value of the right which is taken. This is the value of the physical thing taken, at the time that it is taken, or the market value of the privilege to make special use of the thing taken, at the time the privilege to make special use of that physical thing is taken.

The District Judge introduced into the case two additional concepts. First, he ignored the monetary and uncompensable loss to appellants, and ignored the value of the privilege to make special use of appellants' land, at the time that privilege to make special use of appellants' land was taken, and instead directed his attention to the extent of the exercise of the privilege as distinguished from the value of the privilege. Second, ignoring the monetary and uncompensable loss to appellants, and ignoring the value of the privilege to make special use of appellants' land, he directed his attention to the loss arising by physical acts of exercise of the privilege to make special use of appellants' land.

For the purposes of fixing damages appellants concede that no actual monetary loss to them was directly caused by physical asportation of their land by respondent in the exercise or enjoyment of the privilege of making special use of their property. But appel-

lants do not concede that valuable rights in their land were not taken, and appellants do not concede that they have suffered no substantially compensable injury by the *taking* of the privilege of making special use of their property as distinguished from the *enjoyment* by respondent of the privilege to make special use of their property.

"A. UNDER THE CONSTITUTION, APPELLANTS ARE NOT ENTITLED TO RECOVER A SUBSTANTIAL AWARD FOR A MERELY THEORETICAL TAKING."

Under this heading, respondent cites *Marion etc. Railway v. United States,* 270 U.S. 280 (1926), for this assertion:

> "When the United States sets out to acquire private property for public use but never exercises the rights originally sought, the owner is entitled to recover compensation only for what he has actually been deprived of."

This decision is clearly distinguishable on its facts, and the Supreme Court had no intention of prescribing a rule to apply to the facts of this case. There, Act of August 29, 1916, Chapter 418, 39 Stat. at L. 619, 645, *empowered* the President to take over the railroads. By Proclamation of December 26, 1917 the President recited:

> "(I) do hereby * * * take possession and assume control at 12 o'clock noon of the twenty-eighth day of December, 1917, of each and every system of transportation * * * Consisting of railroads * * *."
>
> *Marion etc. Railroad v. United States,* 279 U.S. 280, 282.

In that case the Director General:

> "did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities * * *. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of its traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the government, devoted the net operating income to the company's use."
>
> *Marion etc. Railroad v. United States,* 270 U.S. 280, 282, 283.

Quite different are the instant facts where the District Court made an order placing respondent in possession (R. pp. 38-39) and the contractor engaged by respondent, armed with a copy of this order, took over the property (R. pp. 195-197, 205-206), stacked lumber on it, stored powder on it, cut and installed power poles and strung a power line (R. pp. 197-204, Def. Ex. I, J, K, L), took a small amount of gravel (R. pp. 256, 260, 271-272) and placed a lock on the gate, enabling only the contractor access to the property except that appellant Morrison was given access to a cabin located thereon (R. p. 206) and otherwise excluding appellants from mining for one year and eleven months.

Respondent continues:

> "presumably they (appellants) would say that the *Marion Ry* case is inapplicable because it was instituted in the Court of Claims". (Parentheses added.)

Instead, appellants say that this Court found, and respondent does not challenge that finding,

> "That plaintiff entered into possession of said land on the 17th day of October, 1939; that plaintiff abandoned the land subject of this action on September 13, 1941, * * *."
>
> (R. p. 87.)

Whereas in the *"Marion Ry"* case, as we pointed out above, there was no physical taking of the railroad's property whatsoever.

Thus *Marion etc. Railroad v. United States,* 270 U.S. 280 (1926), is only authority for the proposition that a legal taking without any physical interference is not compensable.

In appellants' opening brief (pp. 33-37), we pointed out that the respondent took the intangible, but well recognized in law, profit à prendre to remove gravel for one year and eleven months. Since the complaint prayed:

> "such right, power, and privilege of use and occupancy of said land the removal of concrete aggregates from and out of said land to be uninterrupted during said period * * * *free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy* * * * (italics ours)
>
> (R. p. 32)

and the order for possession provided:

> "plaintiff is hereby authorized to take possession of said land * * * in the manner set forth in said complaint"
>
> (R. pp. 38-39)

the distinction between *Marion etc. Railroad v. United States,* 270 U. S. 280 (1926), can be more clearly seen by an answer to the question, What became of appellants' right to mine their own land during that one year and eleven months? If that right to mine without interference from respondent remained at all times in appellants, the cases are parallel. If there was an interference, they are not parallel, and the decision in *Marion etc. Railroad v. United States,* 270 U.S. 280 (1926), has no application to the instant case.

Respondent concludes this portion of its argument:

> "As we have pointed out, *supra,* the judgment below represents adequate compensation for the actual loss that has been suffered by appellants * * * to award appellants any substantial sum for the technical taking of the so-called profit à prendre would be 'unjust to the public.' "

Again, appellants point out that respondent's argument, like the opinion of the District Judge, confuses the specific property with the intangible right to enjoy that property; confuses the right to subject appellants' property to certain uses with the extent of enjoyment of that right. In so far as the extent of the enjoyment of that right is concerned, appellants concede there was but a "technical taking", in so far

as the incorporeal right to enjoy is concerned, there has been an actual taking for which no compensation has been paid.

"B. AFTER ABANDONMENT BY THE GOVERNMENT THE COURT BELOW LACKED JURISDICTION TO AWARD COMPENSATION FOR THE ALLEGED TAKING OF A PROFIT A PRENDRE:"

Respondent introduces its argument with these words:

> "When private property is sought to be acquired under the power of eminent domain, unless it is acquired under specific statutory proceedings otherwise, the title does not pass until compensation is actually paid to the owner."

To support this assertion, respondent cites *Hanson Co. v. United States,* 261 U.S. 581 (1923), and *Danforth v. United States,* 308 U.S. 271 (1939), in neither of which cases was there a physical taking involved, and in both of which cases the Court was discussing the general power reserved in the Constitution, 5th Amendment, in the absence of any special statute.

Respondent continues:

> "Thus, even when possession of the property has been taken under court order in the course of a condemnation proceeding the United States may still abandon the proceedings to acquire the interest sought. * * * In such event, it is not liable for the estate or interest which it sought to acquire under its complaint in condemnation. * * * the trial court had no jurisdiction to award compensation for the interest sought in the petition after the United States filed its notice of abandonment."

In each of the cases cited by respondent, condemnation was sought of something corporeal. In each case the general rule was applied, as laid down in *Cherokee Nation v. Southern Kansas R. Co.,* 135 U.S. 641 (1890):

> "the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution, the property, although entered upon * * * is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner,"
>
> *Cherokee Nation v. Southern Kan. R. Co.,* 135 U.S. 641, 659 (1890)

and each decision winds up with a holding of which the following is typical:

> "Enough has been said, we think, to show that the United States were free to abandon the condemnation proceeding at any time before payment of the award and transfer of title, that they took no title until payment, and the possession of the land by the United States did not make these rules inapplicable, and therefore the District Court in North Carolina had no authority to render a personal judgment against the United States."
>
> *Moody v. Wickard,* 136 F. (2d), 801, 804 (App. D.C., 1943).

Appellants concede that had the United States sought to condemn physical gravel, all or any part of the physical gravel in place upon appellants' land, these rules would apply and the District Court would

have been compelled to dismiss the proceedings and without jurisdiction to render any judgment in this action. Appellants' right to relief in such a case would be by independent action under the Tucker Act, 28 U.S.C.A. § 41.

But it does not follow, as respondent argues:

> "Consequently, the fact that Section 5 of the River and Harbor Act * * * authorized the United States to take possession of the property pending the condemnation proceeding did not * * * create a vested right in the owners to compensation for the interest described in the complaint."

In our opening brief we pointed out (Br. pp. 33-37) that the United States took nothing corporeal; it elected instead to take an incorporeal right, which, as defined in the complaint, and as provided by U.S. Code, Title 33, Section 594, started to run in October 17, 1939, and continued to run until September 13, 1941. By the very nature of the incorporeal right taken it had to vest in the United States when it was taken by entry into possession on October 17, 1939, and had to remain vested until September 13, 1941, on which date the United States could divest itself only of the unexpired portion of that right from September 13, 1941 to October 17, 1941, and by the very incorporeal nature of that which it had taken could not divest itself of the expired, consumed portion of the incorporeal right taken. To that extent it could not give back the intangible right, the privilege of enjoying which had belonged to the United States,

because that portion of the privilege was no longer in existence to return.

"Abandonment" presupposes something to abandon or give back. To the extent that a thing has ceased to exist it cannot be abandoned or given back. The declaration of abandonment is not the giving back, it is but evidence of a wish to give back. In order to "give back" anything, that which is given back must be at least in existence, and not be less even than its ashes or spirit.

Abandonment of a condemnation proceeding must be a complete surrender of the project so far as the land involved is concerned.

Robertson v. Hartenbower, 120 Iowa 410, 94 N. W. 857.

By the word "abandonment" is ordinarily understood a yielding, ceding or giving up. There can be no "abandonment" when the entire property is destroyed and there is nothing left to give up.

Cumberling v. McCall, 2 U. S. (2 Dall.) 280, 283.

See also Words & Phrases, Perm. Ed.,
"Abandon; abandonment-Relinquishment."
Vol. 1, pp. 53-56.

Since by the very nature of the right which respondent itself chose to take it could not give back the consumed portion of that right, the declaration of abandonment was to that extent ineffective, and could not any more divest the District Court of jurisdiction to make an award for the incorporeal

profit à prendre than did it divest the District Court of jurisdiction to make an award for one year and eleven months of possession which respondent could not return to appellants, and from which award respondent has not appealed.

This is the perfect answer to respondent's argument:

> "Thus when the United States filed notice of abandonment * * * the court lost jurisdiction to award compensation for the profit a prendre which, appellants claim, was sought in the petition. The only liability of the government after abandonment was for one year and eleven months' occupancy of the property."

There is no logic to the position taken by respondent that the Court had jurisdiction to award compensation for possession of the physical land, which possession could not be abandoned, yet lacked jurisdiction to award compensation for vesting of the portion of the incorporeal right which could no more be abandoned than could the physical possession of the land which concurrently existed.

"C. IN ANY EVENT, APPELLANTS HAVE BEEN AWARDED COMPENSATION FOR ALL RIGHT WHICH THE GOVERNMENT SOUGHT TO CONDEMN."

Respondent opens its argument under this heading with these words:

> "It may be assumed that the rights thus described are properly designated by appellants as an 'incorporeal profit a prendre.'' Although the right of 'uninterrupted use and occupancy' * * *

> described would seem to be a separate and distinct right, broader than the mere right of entry for the purpose of removing the gravel, it is not believed that the Government's liability turns upon any technical distinction as to the exact nature of the estate or interest sought and that a precise definition is unnecessary".

We pointed out in our opening brief (Br. pp. 46-51) that the peculiar incorporeal right selected for condemnation was the selection of the United States. We also related evidence of the prior negotiations (Br. p. 8) to show that the peculiar right was not an accidental selection, but the deliberate selection by respondent in carrying into effect a desire to be unlimited and unrestricted in the exercise of the rights sought in appellants' land. We also referred, and again refer, to the record (R. pp. 251-252) that the right sought was valued by the respondent at $11,875 at least, and, with proper safeguards, had a value of 10¢ per cubic yard of gravel removed in addition to the $11,875 figure. (R. pp. 221-223.)

This language above quoted from respondent's brief suggests an attempt to avoid an incorporeal right, expressly and deliberately defined in the complaint, and to liken that incorporeal right to a corporeal right and to assess damages for its taking accordingly. It is submitted that damages for the taking of an interest in real property are incapable of ascertainment without an understanding and definition of the "exact nature of the estate or interest sought". Authorities

on our position appear in our opening brief. (Br. pp. 46-51.)

Respondent continues:

> "the testimony does not warrant appellants' assertion that the 'safeguards' set out in the complaint for the removal of the gold were of no value and could not have enabled them to recover the gold."

The authorities are to the effect that it must be presumed, for fixing damages, that the rights taken will be exercised to the fullest extent. (Br. pp. 46-51.) Nowhere does respondent point to any limitation respondent placed upon itself as to speed of removal. Under this test it must be assumed there was and would be no limitation. The evidence amply sustains appellants' assertion that without limitation to 100 cubic yards per hour the gold could not have been recovered. (R. pp. 223-224.)

The argument continues:

> "Thus it is clear that the Government did not intend to take the gold and that if the project had been carried out no gold would have been taken by the United States. * * * the complaint stated that if the landowners should fail or refuse to follow the method for recovery of the gold, The United States 'shall have the option to either take the said concrete aggregates without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants' * * * While this statement was made in the complaint, it was not set forth in the

> prayer for relief when the United States specified the judgment which it sought * * * It was obviously intended that the adequacy of the safeguards of appellants' right to the gold should be determined before any judgment was entered and that if those rights could not be protected, an election should be made by the United States upon which alternative of the option the Government would seek judgment * * * it is clear that if the Government had not abandoned the project, such deficiences as might have existed in the complaint would have been remedied by amendment so that no gold would have been taken".

In the first place, such an amendment was never made. In the second place, if made it could have had no more effect on rights already vested than an abandonment, and could not have affected that portion of the incorporeal right which had already expired.

As we have pointed out, the right taken must be measured by the fullest extent to which it may lawfully be exercised. (Br. pp. 46-51.)

Nor is the decision of the Circuit Court of Appeals, 8th Circuit, in *Karlson v. United States,* 82 F. (2d) 330 (1936), of any comfort to respondent's position. In that decision it was virtually conceded that the right taken was to be considered exercisable to its fullest extent, and the easement of flooding was prevented from being construed as an absolute and permanent taking of the land itself only because the easement to flood the land was condemned pursuant to a treaty, and, as the Court stated

> "In any event, if the Treaty is adhered to, as it must be presumed that it will be, the extreme or emergency high level of the lake cannot be maintained continuously, since that could only be done in disregard of the provision of the Treaty as to ordinary levels and as to uniform and continuous discharge of water."
>
> *Karlson v. United States,* 82 F. (2d) 330, 335.

In the instant case not only is there no such measure, but the full extent of the gravel to be taken was not known to respondent until long after the suit was filed. (Br. pp. 23-26.)

The argument continues:

> "We submit, therefore, that appellants' contention here is not well founded because even if the Government had proceeded with the project rather than abandoning it, the United States would not have taken the gold and appellants' rights thereto would have been preserved".

Appellants submit that the expressions of opinion of counsel in Washington, D.C., as to their thoughts on the extent that the Sacramento Office of the War Department Engineers intended to or would have exercised the rights which they condemned are of little help now. They would have been very helpful if they had been incorporated in the complaint. As we have seen, they were not so incorporated.

II.

"THE TRIAL COURT DID NOT ERR IN HIS RULINGS ADMITTING AND REJECTING EVIDENCE."

What assertions are made by respondent under this heading are adequately answered in appellants' opening brief, and no specific reference thereto is herein made.

CONCLUSION.

By way of summary of the foregoing argument, appellants assert the following propositions:

First. Appellants were entitled to a finding by the District Judge of the value of the incorporeal profit à prendre taken by respondent, that value to be fixed as of the date of taking, October 17, 1939, and to sustain which the record contains ample evidence, without diminution by reason of any unexpressed limitations of quantity to be taken or any possible later failure to fully enjoy the rights taken.

Second. The Court did not lose jurisdiction to award this compensation by the filing of the declaration of abandonment because the used and consumed portion of the incorporeal profit à prendre could not be abandoned back.

Third. The award must either be on the theory appellants' rights to the gold were not adequately preserved, or, if they were, that the sum of $11,875 which

it would require to preserve those rights be given due and proper consideration.

Dated, Berkeley, California,
February 27, 1946.

Respectfully submitted,
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